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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jorge Alejandro Rojas,

10 Plaintiff,

11 v.

12 Federal Aviation Administration, et al.,

13 Defendants.  
14

No. CV-16-03067-PHX-GMS

**ORDER**

15 Pending before the Court is Plaintiff Jorge Alejandro Rojas’ Motion Re Estimated  
16 Completion Dates (Doc. 81). For the following reasons the motion is denied.

17 **BACKGROUND**

18 The current motion continues a long-lived dispute between Rojas and the FAA  
19 regarding the many requests Rojas has submitted to the FAA under the Freedom of  
20 Information Act (“FOIA”). Rojas’ Complaint contained multiple allegations regarding  
21 Rojas’ FOIA requests, but his allegations broadly fall within two groups. First, Rojas listed  
22 six specific FOIA requests and generally alleged that the FAA failed to timely provide  
23 estimated completion status updates, that it failed to adequately respond, and that it failed  
24 to respond to his appeals of its production decisions. (*See* Doc. 1 at 3–11.) Next, Rojas  
25 alleged that the FAA had established a pattern or practice of failing to provide estimated  
26 completion dates (“ECDs”) for his requests. He specifically alleged eight FOIA requests,  
27 “among others,” for which he had not received estimated completion dates.

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1           Rojas brought three separate claims: (1) a FOIA violation through failure to comply  
2 with statutory deadlines, (2) a FOIA violation through withholding of agency records, and  
3 (3) a FOIA and Administrative Procedure Act violation through failure to provide ECDs  
4 and “complete administrative action.” (*See id.* at 12–13.) Rojas requested seven forms of  
5 relief: orders requiring (1) reasonable searches for responsive records, (2) provision of  
6 ECDs, (3) disclosure of all responsive non-exempt records, (4) production of a Vaughn  
7 Index, (5) production of records without assessment of fees, (6) a special investigation  
8 under 5 U.S.C. § 552(a)(4)(F), and (7) the payment of attorneys’ fees and costs. (*Id.* at 14.)

9           The FAA moved for summary judgment on the first group of FOIA requests—*i.e.*,  
10 the six named requests in the first group. The Court granted summary judgment for three  
11 requests and denied for three requests. (Doc. 26.) A status conference followed, at which  
12 the Court determined that the FAA had waived its right to raise additional objections to  
13 Rojas’ FOIA requests by not raising them in its summary judgment motion. (*See* Doc. 48  
14 at 2.) The Court also ordered the FAA to provide responsive documents for Requests 8952,  
15 9570, and 4019, with redactions only if agreed to by Rojas. (*Id.* at 3.)

16           The FAA requested an extension of time to fully respond to Request 9570, which  
17 the Court granted. But rather than timely providing documents for Requests 8952 and  
18 4019, the FAA provided responses to all three requests by the extended deadline granted  
19 for Request 9570 only. (*See id.*) When it provided the documents, the FAA had made  
20 redactions to which Rojas had not agreed, in direct violation of the Court’s order. (*Id.*)

21           At the next status conference, the Court denied the FAA’s request for a second round  
22 of summary judgment motions. The Court also gave the FAA thirty more days to respond  
23 to Rojas’ document request. The FAA soon filed notice that it had complied. But again,  
24 the documents had extensive redactions to which Rojas had not agreed. So, the Court  
25 ordered the FAA to show cause as to why it should not be held in civil contempt for  
26 violating the Court’s orders on multiple occasions. (*Id.* at 6.) The Court also directed the  
27 parties to meet and attempt good faith resolution of the remaining issues without further  
28 court intervention. (*Id.*) The show-cause hearing was continued and eventually vacated

1 when the parties indicated that the FAA was finally in compliance with the Court's orders.  
2 (*See* Doc. 56 at 1.) The parties' next joint status report indicated that the FAA would be  
3 making supplemental responses to some of Rojas' requests, and that the parties were again  
4 disputing whether the FAA had provided all responsive documents. (Doc. 58 at 2.) The  
5 Court ordered the FAA to provide supplemental responses. (Doc. 59.)

6 In the next round of joint status reports, the parties indicated that the following  
7 issues remained outstanding in the case: (1) whether the FAA had engaged in a pattern or  
8 practice of failing to provide ECDs to Rojas' requests, (2) whether the FAA should be  
9 sanctioned for its conduct, (3) whether Rojas was entitled to attorneys' fees and costs, and  
10 (4) whether a referral for investigation by the Office of Special Counsel was warranted.  
11 (Doc. 68 at 2–3.)

12 At the subsequent hearing, the Court ordered the FAA to provide ECDs for all  
13 outstanding requests that had been submitted by Rojas by the time he filed his Complaint.  
14 (Doc. 73 at 10.) The FAA complied. (*See* Doc. 74.) The Court then directed Rojas to file  
15 notice of his disagreement with the ECDs provided, if any, and a motion regarding the  
16 ECDs, if needed. (Doc. 80.) Rojas then filed this motion. (Doc. 81.) After Rojas filed it,  
17 the parties filed a joint stipulation of dismissal, in which they agreed to dismiss all issues  
18 in the case except for those addressed by the current motion regarding the ECDs.

## 19 DISCUSSION

### 20 I. Modification of ECDs and Late Production

21 The FOIA requires agencies to “establish a telephone line or Internet service that  
22 provides information about the status of a request to the person making the request using  
23 the assigned tracking number, including . . . an estimated date on which the agency will  
24 complete action on the request.” 5 U.S.C. § 552(a)(7)(B).

25 Rojas' primary contention here is that in some instances, the FAA has unreasonably  
26 revised its initial ECDs and that in other instances the FAA has failed to meet the ECDs it  
27 gave. As ordered by this Court, the FAA provided ECDs to Rojas. Many of the ECDs  
28 have now passed and Rojas has received documents responsive to his requests. As of the

1 date of the FAA's response to Rojas' motion, 71.15% of the 104 ECDs had been completed,  
2 leaving 30 ECDs pending. Of those thirty, nine requests have ECDs after January 1, 2020.  
3 Two have ECDs that extend into 2021.

4 Of the 74 completed ECDs, the FAA completed 40 before their ECDs, and 18 were  
5 completed on the original ECD. For 11 requests, the FAA provided revised ECDs after  
6 further reviewing the amount of work it would take to respond to Rojas' requests. The  
7 FAA has yet to miss a revised ECD. (*See* Doc. 85-2 at 24.)

8 Rojas particularly disagrees with ECDs that extend into 2020 and 2021. But the  
9 FAA's response sets forth the reasonable explanations for ECDs given. The ECDs are, by  
10 definition, estimates. The FAA based the ECDs on a variety of factors, including how  
11 many pages searches yielded, the number of business hours available to process requests,  
12 time required to coordinate with multiple offices responding to requests, previous  
13 processing times for similar requests, the agency's workload outside of Rojas' requests,  
14 and time needed for legal review and finalization. (*See* Doc. 85 at 3.) For the nine requests  
15 that have been assigned ECDs in 2020 or 2021, the FAA concluded, based on a  
16 combination of those factors, that the requests could not be completed sooner. Rojas has  
17 not demonstrated that the FAA's ECDs were unreasonable or given in bad faith. And for  
18 many of the requests with extended ECDs, Rojas declined to refine or narrow the scope of  
19 his request so that it could be processed faster. (*See* Doc. 85 at 5–6.) In these  
20 circumstances, the Court declines to second-guess the agency's determinations regarding  
21 its own work capacity. Thus, Court intervention regarding the ECDs is not warranted here.

22 Rojas also complains that the FAA did not meet some of the original ECDs—and  
23 the FAA admits as much. But for those requests, it did make productions shortly after the  
24 ECD. In fact, for each of those requests, the FAA completed its response within three  
25 business days of the ECD. Since, again, the ECDs are estimates, a production made within  
26 three business days of an ECD is not unreasonable and does not warrant judicial  
27 intervention.

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## **II. Rolling Productions**

Rojas also requests that the Court order rolling productions for all requests that have ECDs after January 1, 2020. He requests an order directing that the FAA be required to produce a certain number of pages per month on each request, with the amount set to increase on January 1, 2020 for any remaining requests. The FAA, in turn, has proposed a schedule for each of the requests that have ECDs in 2020 or 2021. While the FAA's proposed schedule does not set a specific monthly page quota for each request, it does require monthly productions for each one. The risk of the FAA's proposed schedule, of course, is that it would allow the FAA to make only small monthly productions and then simply revise the ECDs for those requests, thereby dragging out production even further.

However, for the reasons outlined in the FAA's Response, a specific page quota for each month is not necessary or even workable here. The Petitioner has not demonstrated that the FAA has the capacity to supply any particular monthly-rolling quota. The FAA has represented that it will make monthly productions, and it has provided ECDs for each of the requests. How to meet those ECDs is best left to the discretion of the agency at this point. The FAA is most familiar with its capacity as well as its limitations. Given the FAA's representations regarding its commitment to the production schedule it has proposed, as well as the reasonableness of its ECDs, the FAA should not view this decision as *carte blanche* to drag out production of these requests. Should the FAA do so, Rojas will have recourse in the courts for the FAA's continued non-compliance.

The FAA should begin rolling productions on Rojas' requests as outlined in their response. (See Doc. 85 at 10–11.)

## **III. Interim Appeals**

Rojas next requests that the Court require the FAA to allow Rojas to appeal productions made on a rolling basis instead of appealing only after the production is completely made. The FOIA allows requesters to administratively appeal "adverse determinations" to FOIA requests. *See* 5 U.S.C. § 552(a)(6)(A)(i). Department of Justice guidelines on FOIA appeals suggest that agencies provide for intermediate appeals when

1 productions are made on a rolling basis. *See OIP Guidance: Adjudicating Administrative*  
 2 *Appeals Under the FOIA*, Department of Justice (updated Feb. 14, 2019),  
 3 [https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%](https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA)  
 4 [20under%20the%20FOIA](https://www.justice.gov/oip/oip-guidance/Adjudicating%20Administrative%20Appeals%20under%20the%20FOIA).

5 Requiring the FAA to allow interim appeals of its rolling productions is not  
 6 necessary here. Although DOJ guidelines do suggest that interim appeals be allowed, they  
 7 do not require that they be. And neither does the FOIA itself. Other than the DOJ guidance  
 8 document, Rojas points to no legal authority to support his argument that interim appeals  
 9 be required here. He also points to no authority that would allow the Court to order the  
 10 relief he seeks. And the resolution of Rojas' FOIA requests has already been bogged down  
 11 for years. Requiring the FAA to allow appeal of each interim production made could  
 12 further inhibit the timely resolution of this already long-lived dispute. Considerations of  
 13 efficiency suggest that it would streamline the appeals process to have Rojas file a single  
 14 appeal of a completed production. The opposite scenario—the potential for multiple  
 15 appeals per month—is undesirable here. For those reasons, the Court declines to order the  
 16 FAA to allow interim appeals of the rolling productions.

#### 17 **IV. Assessment of Fees**

18 The FOIA allows agencies to assess fees for requests so long as certain requirements  
 19 are met. If an agency fails to comply with the FOIA's time limits for responding to requests  
 20 and appeals, the agency is generally barred from assessing search fees. 5 U.S.C. §  
 21 552(a)(4)(A)(viii)(I). If the agency “has determined that unusual circumstances apply . . .  
 22 and the agency provide[s] a timely written notice to the requester” regarding that  
 23 determination as required by 5 U.S.C. § 552(a)(6)(B), the agency may still assess fees if  
 24 it complies within ten days of the original twenty-day time limit.<sup>1</sup> *Id.* (II)(aa). Further, if the

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25 <sup>1</sup> Paragraph (B)(iii) defines “unusual circumstances” for purposes of (6)(B) as:

- 26 (I) the need to search for and collect the requested records
- 27 from field facilities or other establishments that are
- 28 separate from the office processing the request
- (II) the need to search for, collect, and appropriately

1 agency has determined that unusual circumstances apply and that “more than 5,000 pages  
2 are necessary to respond to the request,” the agency may still assess fees so long as it  
3 provided timely written notice to the requester under (a)(6)(B) “and the agency has  
4 discussed with the requester . . . how the requester could effectively limit the scope of the  
5 request.” *Id.* (bb).

6 Request 9154 was submitted on September 3, 2016. (Doc. 81 at 84.) Because  
7 September 3 was a Saturday, and the following Monday was a federal holiday, September  
8 6 was the day the clock began to run. On September 14, within the original twenty-day  
9 period for response by the agency, the FAA acknowledged receipt of Request 9154 and  
10 informed Rojas that it had determined that “unusual circumstances” applied because “it  
11 [was] necessary to search for and collect the requested records utilizing an office that is  
12 separate from the office(s) processing the request. (Doc. 85-3 at 52); *see also* 5 U.S.C. §  
13 552(a)(6)(B)(iii)(I). The FAA’s letter also invited Rojas to discuss reformulation of the  
14 request or an alternative time frame for processing the request. (Doc. 85-3 at 52); *see also*  
15 5 U.S.C. § 552(a)(6)(B)(ii).

16 The FAA’s response on September 14 thus complied with the requirements for  
17 notice under (a)(6)(B). For that reason, because the agency had determined that unusual  
18 circumstances existed and that more than 5,000 pages would be necessary to respond to  
19 the request, it was allowed to assess fees under 5 U.S.C. § 552(a)(4)(A)(vii)(II)(bb).

20 Rojas contends that the agency cannot assess fees for the request because the FAA’s  
21 September 14 letter did not specify that the agency had concluded that its response to the  
22 request required more over 5,000 pages of documents. (Doc. 89 at 11.) But he misreads  
23 the statute. In order to assess fees, the FAA was only required to “determine[] that unusual  
24 circumstances apply and more than 5,000 pages are necessary to respond to the request”

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25 examine a voluminous amount of separate and distinct  
26 records which are demanded in a single request; or

27 (III) the need for consultation, which shall be conducted with  
28 all practicable speed, with another agency having a  
substantial interest in the determination of the request  
or among two or more components of the agency having  
substantial subject-matter interest therein.



1 so long as “the agency has provided a timely written notice to the requester in accordance  
 2 with [§ 552(a)(6)(B)] and the agency has discussed with the requester via written mail . . .  
 3 how the requester could effectively limit the scope of the request.” 5 U.S.C. §  
 4 552(a)(4)(A)(viii)(II)(bb). Paragraph (A)(viii) does not require the FAA to tell Rojas that  
 5 it had concluded that the response would require more than 5,000 pages.

6 And neither does paragraph (6)(B). Rather, it requires only that the agency set forth  
 7 the unusual circumstances it had determined applied, notify Rojas that the request could  
 8 not be completed within the ten-day extension, and “provide the person an opportunity to  
 9 limit the scope of the request so that it may be processed within that time limit or an  
 10 opportunity to arrange with the agency an alternative time frame for processing the  
 11 request.” *Id.* (6)(B)(ii). The agency’s letter met those requirements. Because the agency  
 12 provided the notice required by (6)(B), the agency may assess fees for Request 9154.

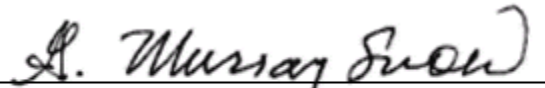
### 13 CONCLUSION

14 For these reasons, further Court intervention here is not needed. Because Rojas  
 15 admits in his Reply that the FAA has provided legible copies of the records he complained  
 16 of, the Court does not address that issue.

17 **IT IS THEREFORE ORDERED** that Plaintiff Jorge Alejandro Rojas’ Motion Re  
 18 Estimated Completion Dates (Doc. 81) is **DENIED**.

19 **IT IS FURTHER ORDERED** that the parties shall file, **within seven (7) days** of  
 20 the date of this Order, a joint report outlining whether, after the parties’ Joint Notice of  
 21 Stipulation of Partial Dismissal (Doc. 84) and this Order, any issues remain in this action.

22 Dated this 26th day of August, 2019.

23   
 24 G. Murray Snow  
 25 Chief United States District Judge